Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ESTELA ORTIZ-NAVA,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an Immigration Judge's purported misapplication of law to the undisputed facts of a discretionary decision can create a colorable claim to due process ultimately creating a inherent statutory conflict in terms of jurisdiction?

   A. Whether the Immigration Judge's decision in the present case exemplified this purported conflict

2. Whether the Board of Immigration Appeals streamlining procedure is in offense of an alien immigrant's right to due process under the Fifth Amendment to the Constitution of the United States?

3. Whether the Board of Immigration Appeals streamlining procedure's application to Petitioner, as affirmed by the United States Court of Appeals for the Ninth Circuit in accordance with Falcon Carriche v. Ashcroft, 350 F.3d 845 (9th Cir. 2003), violated Petitioner's right to due process under the Fifth Amendment of the Constitution of the United States.

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Paramasamy v. Ashcroft,
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Perez-Lastor v. INS,
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8 U.S.C. § 1182(a)(6)(A)(i); INA § 212(a)(6)(A)(i). . . . 4

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REAL ID Act of 2005, § 106(a), Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005). 1

REAL ID Act of 2005, § 106(c), Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005). 7

MISCELLANEOUS

Kenney, Mary, How To Challenge An Affirmance Without Opinion By A BIA Member, <http://www.ailf.org/lac/lac_pa_100102.asp>, September 27, 2002 20

L. Getter and J. Peterson, Speedier Rate of Deportation Rulings Assailed, Los Angeles Times, January 5, 2003, at A-1. 19

Gelernt, Lee, Testimony at Hearing on "Strengthening Interior Enforcement: Deportation and Related Issues", http://www.aclu.org/safefree/general/17523leg20050414.html, April 14, 2005. 22

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Estela Ortiz-Nava ("Petitioner") respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit dismissed the preceding petition for direct review in part and denied such for lack of jurisdiction in part on July 31, 2006. (Appendix[1] "A", *infra*, 1a-3a.) On March 25, 2005, the Board of Immigration Appeals ("BIA") in the United States Department of Justice's Executive Office of Immigration Review (App. "B", *infra*, 4a-5a), affirmed the opinion the decision of the Immigration Judge (App. "C", *infra*, 6a-20a) originally entered on February 11, 2004.

JURISDICTION

As stated above, the court of appeals entered its final judgment for docket number 05-72303 on July 31, 2006 (App. "A", *infra*, 1a-3a) in an unreported decision and order. The preceding petition for review invoked the jurisdiction of the court of appeals under 8 U.S.C. § 1252, as amended by the REAL ID Act of 2005, § 106(a), Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005). The instant petition for writ of certiorari invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

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[1] "Appendix" will hereinafter be referred to as "App.".

STATUTORY PROVISION INVOLVED

INA § 240A(b), 8 U.S.C. § 1229b(b) reads, in pertinent part:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien an alien who is inadmissible or deportable from the United States if the alien–...
>
> (A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
>
> (B) has been a person of good moral character during such period;
>
> (C) has not been convicted of an offense under section 212(a)(2), 237(a)(2) or 237(a)(3) [8 USCS § 1182(a)(2), 1227(a)(2), or 1227(a)(3)], subject to paragraph (5); and
>
> (D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Moreover, 8 U.S.C. § 1252(a)(2)(B)[2], subtitled "[d]enials of discretionary relief", reads "no court shall have jurisdiction to review...any judgment regarding the granting of relief

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[2] This subsection pertains specifically to the federal court's jurisdiction to review decisions originating with the Immigration Court under 8 U.S.C. § 1229b(b).

under section 212(h), 212(i), 240A, 240B, or 245 [8 USCS §§ 1182(h), 1182(i), 1229b, 1229c, or 1255." Despite this seemingly limitless jurisdictional bar for specific discretionary decisions, 8 U.S.C. § 1252(a)(2)(D) reads:

> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

In addition, Section 101(a)(47) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(47) established *both* that persons in removal proceedings have a right to an administrative appeal and also that the Board of Immigration Appeals is the final adjudicator in the administrative appeals process.

STATEMENT OF THE CASE

The application of the sections for relief from removal proceedings contained in the Immigration and Nationality Act ("INA"), and the appellate review of such relief applications, affects thousands of immigrants each year in their quest to remain lawfully in the United States. The recently-passed REAL ID Act of 2005 vests exclusive jurisdiction with the federal circuit courts over constitutional questions of due process arising from INA's application to an alien applying for relief. As a result of the federal circuits below, whom apparently vary on whether issues of application of law to fact can or cannot raise a colorable due process claim, there is an

inherent conflict in the interpretation and application of the jurisdictional portions of the INA.

A. PETITIONER'S IMMIGRATION AND FAMILY STATUS

Petitioner is a 39-year-old native and citizen of Mexico who first entered this country on or about November of 1987. Petitioner has three sons, ages 16, 14, and 10, who are all United States citizens. She provides a majority of the financial support for the family as her husband additionally is an illegal alien who has been deported to Mexico. Her children all are excelling in school and are immersed within the only cultural backdrop they have ever know which is that of the American lifestyle and school system. None of the children are able to write in the Spanish language. Petitioner has maintained a stellar and consistent work record in the United States since entering this country, and suffered no criminal convictions or immigration violations other than those contained in the NTA. In addition, Petitioner has significant property ties within the United States as evidenced by the large amount of equity within the family abode.

B. PROCEEDINGS BELOW

After voluntarily surrendering herself to the Government, Petitioner was issued a notice to appear ("NTA") on April 2, 2003 alleging her removable as an alien present in the United States without being admitted or paroled pursuant to Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i). Petitioner applied for cancellation of removal ("COR") for certain non-permanent residents under Section 240A(b), 8 U.S.C § 1229b. (App. "C", *infra*, 7a.) The Immigration Judge ("IJ") found that Petitioner established both the continuous physical presence

and good moral character requirements. (App. "C", *infra*, 9a) In fact, the IJ found that she is a person of "high moral character" as one dedicated to the excellence of her children and the community. (App. "C", *infra*, 9a.)

However, the IJ denied Petitioner relief due to her alleged inability to meet the "exceptional and extremely unusual hardship" legal standard procured by the Board of Immigration Appeals ("BIA") in In Re Monreal, 23 I&N Dec 56 (BIA 2001) and Matter of Andazola, I&N Dec. 319 (BIA 2002) and the Ninth Circuit in Perez v. INS, 96 F.3d 390, 393 (9th Cir. 1996). (App. "C", *infra*, 13a) Petitioner timely appealed to the BIA who, on March 25, 2005, affirmed the decision of the Immigration Judge without opinion. (App. "B", *infra*, 4a-5a)

Petitioner then filed a petition for direct review with the Ninth Circuit Court of Appeals alleging: (1) existence of federal circuit jurisdiction based on the IJ's pure application of law to the factual determination, (2) the IJ's misapplication of the relevant legal standard to the undisputed facts of the case in the hardship determination deprived her of due process, and (3) the BIA's streamlining procedures violated Petitioner's right to due process under the Fifth Amendment of the Constitution of the United States. On July 31, 2006, that Court issued an order, in docket number 05-72303, dismissing the petition (App. "A", *infra*, 1a-3a) for lack of jurisdiction and failure to raise a colorable claim of due process, and further failure to raise a claim in accordance with its own precedent in Falcon Carriche v. Ashcroft, 350 F.3d 845 (9th Cir. 2003).

REASONS FOR GRANTING THE PETITION

I. IN THAT THE REAL ID ACT OF 2005 VESTED JURISDICTION EXCLUSIVELY WITH THE CIRCUIT COURTS OVER CLAIMS OF DUE PROCESS VIOLATIONS, CONFLICT INEVITABLY EXISTS BETWEEN SUCH STATUTE AND VARYING CIRCUIT PRECEDENT BELOW BECAUSE OF THE GENERAL NOTION THAT A PURE APPLICATION OF LAW TO FACTS CREATES A COLORABLE CLAIM TO DUE PROCESS.

One of the primary issues presented by the denial by the Ninth Circuit in the present case is whether a purported "misapplication of case law" can sufficiently raise a colorable due process claim. (App. "A", *infra,* 2a.) The Ninth Circuit determined that despite Petitioner's arguments that the IJ misapplied the relevant legal standards to the undisputed facts related to Petitioner's cancellation of removal application, the ultimate decision was discretionary and therefore was not subject to review. (App. "A", *infra*, 2a.) What is more, the Ninth Circuit relied on it's own precedent in finding that "misapplication of case law" can *never* sufficiently raise a colorable due process claim. (App. "A", *infra*, 2a [citing Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001)].)

Notwithstanding the jurisdiction-stripping provisions for cases involving denials based on hardship determinations under 8 U.S.C. § 1229b(b), the Third Circuit Court of Appeals has determined "*issues of application of law to fact*, where the facts are *undisputed* and *not the subject of challenge*" *can* raise a colorable claim for due process sufficient for review per 8 U.S.C. § 1252(a)(2)(D). Kamara

v. AG of the United States[3], 420 F.3d 202, 211 (3d Cir. 2005) (citing Bakhtriger v. Elwood, 360 F.3d 414, 420 (3d Cir. 2004), Ogbudimkpa v. Ashcroft, 342 F.3d 207, 222 (3d Cir. 2003)). This is relevant and an essential reason for granting the instant petition when considering the legal standards an IJ uses in the hardship determination under U.S.C. § 1229b(b). For example, the IJ in the present case utilized three legal standards from various cases, In Re Monreal, 23 I&N Dec 56 (BIA 2001), Matter of Andazola, I&N Dec. 319 (BIA 2002) and Perez v. INS, 96 F.3d 390, 393 (9th Cir. 1996), and applied them to the undisputed facts related to the hardship determination. (App. "C", *infra*, 9a-12a.)

The IJ specifically found:

> [I]t is important to keep in mind that the *burden of proof* upon the respondent is *not* to demonstrate that her removal would result in a unconscionable level of hardship...See Matter of Monreal, supra...the Government correctly points out that there are *two possible scenarios* for this Court to consider in *evaluating* the type of hardship that would befall the three children...it would be improper to attribute hardship to parental choice...in this Court's view [Respondent must put forth] the evidence

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[3] Although the Third Circuit's analysis in Kamara technically was in the habeas corpus context under 28 U.S.C. § 2241, such analysis should apply in the non-habeas context as here because the REAL ID Act's transfer of all habeas petitions to the circuit courts. See REAL ID Act of 2005, 109 P.L. 13; 119 Stat. 231, Section 106(c).

> to show that it is a realistic opportunity [to leave the children behind].

(App. "C", *infra*, 10a-12a)(emphasis added.) Moreover, the IJ further evidenced his use of a pure legal standard by applying the law of Perez v. INS, 96 F.3d 390 (9th Cir. 1996) in relation to Petitioner's intent, or lack thereof, to leave her children behind. The IJ stated:

> In this Court's view, the Ninth Circuit....did clearly agree with the evidentiary standard showing respondent would have to come forth with the evidence to show that [leaving the children behind] is a realistic opportunity."

(App. "C", *infra*, 12a)(emphasis added.) In connection with this standard, the IJ concluded:

> [R]espondent has not carried her burden of proof to show that her removal from the United States would result in exceptional and extremely unusual hardship to any of the three children...[i]f the respondent were to leave the children behind, she has not carried *the evidentiary consideration* to show that it is a viable option to leave them behind...

(App. "C", *infra*, 13a-14a.)

In brief, it is reasonable to conclude the IJ was applying pure legal and evidentiary standards to the undisputed facts of Petitioner's application for cancellation of removal as related to the hardship determination. This is relevant to the current petition because the Third Circuit's holding in Kamara suggests an misapplication of law to undisputed facts *can*

constitute a colorable claim to a due process violation. As described above, a due process violation unquestionably vests the circuit courts of appeal with jurisdiction pursuant to 8 U.S.C. § 1252(a)(2)(D) . However, in this scenario, which is certainly plausible based on the foregoing reasoning, such would conflict with the jurisdictional bar under 8 U.S.C. § 1252(a)(2)(B). It should be further noted the Kamara holding suggests a precedent conflict with the Ninth Circuit's holding in Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001) which determined that "misapplication of case law" may not be reviewed. These conflicts underscore the importance of granting the current petition.

A. *MATTER OF RECINAS* AS A FURTHER LEGAL STANDARD THE IMMIGRATION JUDGE IS REQUIRED TO ABIDE BY IN THE HARDSHIP DETERMINATION.

In the context of the IJ's denial, Petitioner contended the IJ failed to take another controlling legal and evidentiary standard from BIA precedent, namely Matter of Recinas, 23 I&N Dec. 467 (BIA 2002), into the hardship determination. In Recinas, the BIA emphasized the alien was a single mother who would have the heavy burden of providing the sole financial and familial support for her children if she was deported to Mexico. Matter of Recinas, 23 I&N Dec. 467, 470 (BIA 2002). The BIA premised the "exceptional and extremely unusual hardship" element as NOT needing to be "unconscionable." Id. The fact that the alien was the ***sole support*** for her children "increases the hardship the children would face upon a return to Mexico, as they would be completely dependent on their's mother ability, not only to find adequate employment and housing, but also to provide for their emotional needs." Matter of Recinas, 23 I&N Dec. 467 at 470.

In connection, the Board noted that the alien's children had difficulty speaking Spanish and could neither read nor write Spanish. Id. In addition, the fact that Recinas' USC children had spent their ***entire lives*** in the United States was extremely relevant because it demonstrated "they knew no other way of life." Matter of Recinas, 23 I&N Dec. 467 at 470. As the alien in Recinas had no "close relatives remaining in Mexico," the BIA found the hardship extolled on the family unit upon a forced return to Mexico would be extremely detrimental. Id. The reasoning was that "the respondent's ability to provide for the needs of her family will be severely hampered by the fact that she does not have any family in Mexico who can help." Id. Furthermore, the Board noted that the alien lacked the availability of an alternative means of immigrating to this country. Recinas, 23 I&N at 470-72. The BIA held that "these critical factors *distinguish* her case." Id. (emphasis added).

B. THE IJ'S MISAPPLICATION OF *MATTER OF RECINAS* TO THE UNDISPUTED FACTS OF PETITIONER'S CASE WHICH GIVES RISE TO A COLORABLE CLAIM TO DUE PROCESS.

Unlike the children in Monreal and identical to the children in Recinas based on the undisputed facts of the case, Petitioner's children in the instant case, are for the most part, dependent on Petitioner financially and emotionally as she is the driving force behind her children's highest-level achievements in school and society as conceded by the IJ. (App. "C", *infra*, 9a.) The IJ specifically stated that Petitioner "is truly motivated by a desire to bring out the very best in her three children." Id. Petitioner's oldest son, Jose, maintains a 4.0 GPA, excels in karate, and is involved with after-school activities such as the orchestra. CAR at 44. The IJ even noted "the record is replete with certificates that he

has received as a result of his outstanding educational achievements." Id.

In addition, he is in a program termed "GATE" which is a special program for academic excellence which fosters further success in life. (App. "C", *infra*, 13a.) The base his mother has provided has motivated him to further excel in life as an architect as the IJ stated "his educational drive and desire to achieve success is received to him from the emphasis that his mother has placed on his education." (App. "C", *infra*, 13a.)

The younger boys are following their mother's molding of Jose and exhibiting every sign of the same excellence as their brother. (App. "C", *infra*, 13a) Their mother volunteers three hours per day and fifteen hours per week in support of her children at their school. Id. This is important as it shows the support the children rely on in that her mother's connection to their school is quite intricate.

More importantly, the two oldest sons, ages 16 and 14, are in high school. These facts are extremely relevant in meeting the evidentiary hardship legal standard because it is at this age which lays the foundation for the rest of their lives in terms of direction. What this means is this is a time when the children make future decisions where to seek higher education. Ripping them from this critical juncture would significantly reduce their chances of attaining higher education they have worked so hard to achieve thus far. In addition, is it highly unlikely Petitioner would be able to be involved physically in her children's school as she does in the United States. It is inconceivable to even expect they would return to this high level of success upon a forced acclimation to a foreign culture with admittedly lower standards.

Assuming arguendo, Petitioner does take her children with her, as in Recinas, Petitioner's USC children would be completely dependent on their parent's ability, not only to find adequate employment and housing, but also to provide for their emotional needs, and as such, the level of hardship is raised. See Matter of Recinas, 23 I&N Dec. 467 (BIA 2002). Petitioner's younger son testified that he was deathly afraid of his mother's inability to find suitable living arrangements upon their forced return to Mexico. (App. "C", *infra*, 13a.)

Furthermore, Petitioner's USC children read and speak English as a primary language, and cannot read or write in the Spanish language proficiently and have only a limited Spanish speaking capability. Petitioner testified that "they've never been in a Spanish class." Petitioner's oldest son testified that English is his best language. The Government's questioning even revealed the children have never received a bilingual education. Also, her children speak to her in English. The IJ even conceded this point in that "none of them is versed in the written Spanish language." (App. "C", *infra*, 15a.) Most importantly, as identical to the children in Recinas, Petitioner's children have spent "all their lives here" and therefore, under the logic of the aforementioned decision, would "know no other way of life." Matter of Recinas, 23 I&N Dec. 467 (BIA 2002). In addition, Petitioner has no immediate "availability of an alternative means of immigrating to this country." Recinas, 23 I&N at 470-72. As such, in accordance with Recinas, "these critical factors *distinguish* her case." (emphasis added) Id.

Therefore, per the "cumulative analysis" of hardship factors in Recinas, the heavy financial and familial burden on Petitioner, the lack of availability of familial financial support in Mexico, the USC children's unfamiliarity with the Spanish

language, and the lack of available alternate methods of immigrating is well beyond the hardship that "is normally experienced in most cases of removal." Matter of Recinas, 23 I&N Dec. 467 (BIA 2002). This is relevant to the conflict cited above because Petitioner's presentation of this argument lays a proper foundation for whether the IJ misapplied the relevant *legal and evidentiary* standards in the hardship determination. According to the logic of the Kamara case from the Third Circuit , Petitioner could ultimately present a meritorious due process violation for misapplication of law to the undisputed facts of the case. As such, the holding below illustrates the statutory and precedent conflict described above while further suggesting such decision was wrongly decided.

II. THE DIFFERING STANDARDS FOR HARMLESS ERROR AMONG THE CIRCUITS CAUSE FEDERAL REVIEW OF THE BIA'S STREAMLINING REGULATIONS TO BE INCONSISTENT ULTIMATELY LEADING TO UNEQUAL TREATMENT FOR ALIENS DEPENDING ON GEOGRAPHICAL LOCATION.

The BIA's streamlining regulation, otherwise known as affirmance without opinion ("AWO"), is a three-sentence decision by a single Board Member that affirms, without any explanation, the results of the decision reached by an IJ in a case. See 8 C.F.R. § 3.1(e)(4) (September 25, 2002). An AWO decision indicates that the Board member agrees with the result reached by the IJ, but does not necessarily indicate agreement with the IJ's reasons for reaching that result. See 8 C.F.R. § 3.1(e)(4)(ii). A Board member is authorized to use the AWO procedure only if the case satisfies the requirements for such a decision which are set out in the regulations. See 8 C.F.R. § 3.1(e)(4)(i).

For the AWO procedure to be used, the regulations require the Board Member to first review the merits of the case to ensure that the result reached by the IJ was correct. The Board Member must also make sure that the case satisfies several other criteria, discussed below, before using the summary AWO procedure. If a case does not satisfy all of the required criteria, then the single Board Member has the authority to issue a brief order affirming, modifying, or remanding the case. 8 C.F.R. § 3.1(e)(5). Unlike AWO decisions, these brief orders will contain at least some explanation for the decision. In very limited circumstances, the case will be reassigned to a three-Member panel of the Board. Id.; 8 C.F.R. § 3.1(e)(6). Three-Member panels of the Board will truly become the exception, rather than the predominant method for deciding cases.

The regulations are clear that an AWO is an affirmance of the results of the IJ's decision but not necessarily an affirmance of the IJ's reasons for his or her decision. Despite the fact that the Board Member may disagree with the IJ's reasons for the decision, the Board Member is *prohibited* by the regulation from explaining his or her own reasons. Instead, the AWO decision issued by the Board Member must contain only the following three sentences: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination." 8 CFR 3.1(e)(4).

Before affirming an IJ's decision without opinion, the Board Member must determine that the case satisfies the criteria for an AWO decision set forth in 8 C.F.R. § 3.1(e)(4)(i). Specifically, the case must satisfy both of the requirements listed in sections (a) and (b) below, and one of the two alternate requirements listed in section (c):

> a. the result reached by the IJ must be correct; and
> b. any errors in the decision below must be *harmless or nonmaterial* (emphasis added); and either
> c. (i) the issues on appeal must be squarely controlled by existing Board or federal court precedent and cannot involve the application of precedent to a novel fact situation; or
> (ii) the factual and legal issues raised on appeal must be "not so substantial that the case warrants the issuance of a written opinion in the case."

As indicated above, determining "harmless error" is essential to the BIA's use of the AWO procedure. Unfortunately, the standard for harmless error varies somewhat in different federal circuits. See Agyeman v. INS, 296 F.3d 871 (9th Cir. 2002) (finding prejudice where IJ failed to adequately explain procedures and develop the record); Podio v. INS, 153 F.3d 506 (7th Cir. 1998) (finding IJ's refusal to allow witnesses to testify was prejudicial); Perez-Lastor v. INS, 208 F.3d 773 (9th Cir. 2000) (finding alien prejudiced by his inability to understand the translator); Colemenar v. INS, 210 F.3d 967 (9th Cir. 2000) (finding prejudice where petitioner was "so clearly denied a full and fair hearing"). Moreover, several errors - each of which alone might be harmless - can have a combined effect that is prejudicial. See, e.g., Vargas-Garcia v. INS, 287 F.3d 882, 886 (9th Cir. 2002) (combination of several errors deprived petitioner of due process).

Therefore, as the definition of "harmless error" varies across the judicial circuits, there is room for disparate treatment of aliens geographically in respect to when the BIA

is to use the AWO procedures depending on the circuit the case originates. More importantly, such disparate treatment in the application of immigration laws is in direct conflict with Congress' intended mission in creation of the BIA which "is to provide fair and timely immigration adjudications and authoritative guidance and *uniformity in the interpretation of the immigration laws*." Casas-Chavez v. INS, 300 F.3d 1088, 1092 (9th Cir., 2002)(quoting 64 FR 56135-01, 56136 [1999])(emphasis added). The Second Circuit has supported this contention in holding that the *interests of uniformity in interpretation of immigration law* should outweigh the interests of a circuit's precedence. See Sutherland v. Reno, 228 F.3d 171, 174 (2d Cir. 2000)(emphasis added). This apparent conflict merits a proper review before this Court.

A THE QUESTION PRESENTED HERE IS EQUALLY IMPORTANT.

i. THE VARIOUS CIRCUITS HAVE CONSISTENTLY HELD THAT AN ALIEN IS ENTITLED TO A REASONED DECISION BY THE BIA.

This Court has specifically held that an agency, such as the BIA, is required to explain the reasons behind a decision. SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1946) (calling the requirement a "fundamental rule of administrative law") see also Guentchev v. INS, 77 F.3d 1036, 1038 (7th Cir. 1996) (a statement of reasons for a decision is a "norm of administrative law"). In the Federal Register announcement of the current AWO regulation, the DOJ acknowledged that appellants in removal proceedings have a "right to a reasoned administrative decision." Executive Office of Immigration Review; Board of Immigration Appeals: Streamlining, 64 FR 56135, 56137(1999).

Federal courts have routinely required the Board to provide an explanation for a decision that is sufficient to allow the court to carry out a review. See, e.g., Panrit v. INS, 19 F.3d 544, 546 (10th Cir. 1994)(quoting Turri v. INS, 997 F.2d 1306, 1310 (10th Cir. 1993) [noting that Board has an obligation to "articulate a reasoned basis for its decision"]); Mousa v. INS, 223 F.3d 423, 430 (7th Cir. 2000) (Board must consider all claims and "give careful, individualized, rational explanations for its decisions"); Guentchev v. INS, 77 F.3d at 1038 (citation omitted) (Board "must announce its decision in terms sufficient to enable a court to determine it heard and thought and not merely reacted"); Paramasamy v. Ashcroft, 295 F.3d 1047 (9th Cir. 2002) (Board must provide a 'comprehensible reason for its decisions sufficient for [the court] to conduct [its] review and to be assured that the petitioner's case received individualized attention"); Vargas v. INS, 938 F.2d 358, 363 (2nd Cir. 1991) (citations omitted) ("Board's decision stands or falls on its express findings and reasoning"); Tukhowinich v. INS, 64 F.3d 460, 464 (9th Cir. 1995) (citations omitted) (setting aside a Board decision which failed to support its conclusion with a reasoned explanation based on legitimate concerns).

The Ninth Circuit, where this case originated, has specifically held "we do not allow the Board to rely on 'boilerplate' opinions 'which set out general legal standards yet are devoid of statements that evidence an individualized review of the petitioner's circumstances.'" Ghaly v. INS, 58 F.3d 1425, 1430 (9th Cir. 1995). The Ninth Circuit continued in that the "BIA's decision must contain a statement of reasons for denying petitioner relief adequate for us to conduct our review." Id.

As discussed above, the three sentence AWO decision does not contain any reasons or explanation as to why the

decision was reached. To complicate matter, such a decision fails to even reach the "boilerplate" decision the Ninth Circuit clearly frowns upon. See Ghaly v. INS, supra. The BIA's AWO therefore procedure stands in direct conflict to the various circuits' holding that an alien, at minimum, is entitled to a cogent and decipherable decision by the BIA. This clear conflict stresses the importance for review before this court.

ii. THE AWO PROCEDURE IS FUNDAMENTALLY FLAWED AND DEPRIVES AN ALIEN OF ADEQUATE REVIEW IN THE AGENCY SPECIFICALLY CREATED BY CONGRESS FOR ADJUDICATION OF HIS OR HER IMMIGRATION CASE.

Many of the circuit courts which have ruled on the AWO procedure have taken great effort to comment on such procedure's fallible nature. The First Circuit Court of Appeals expressed concern that a Board member can use the AWO procedure without having to explain why a case meets the AWO requirements. See Albathani v. INS, 318 F.3d 378,379 (1st Cir., 2003). As a result, a court may not be able to tell whether the Board member fully reviewed the case and correctly applied the regulation. Albathani v. INS, 318 F.3d 378,379 (1st Cir., 2003). The Court also recognized that this was not an abstract concern in light of the huge caseload faced by the Board. Id. The Court indicated it would likely consider the issue differently if there was evidence of misapplication of the AWO procedure by the Board, particularly evidence of systemic misuse of the procedure. Id. at 377.

Recently, the Fifth Circuit Court of Appeals has echoed the general concern regarding the flaws in the AWO

procedure. In Yuqing Zhu v. Ashcroft, 382 F.3d 521 (5th Cir., 2004), the Second Circuit vacated the BIA's use of AWO because court did not know if the BIA affirmed on a non-reviewable basis, i.e., untimeliness, or a reviewable basis, i.e., the merits of the asylum claim.

These concerns are clearly valid and discernable in practice when considering the amount of cases in which the AWO procedure is utilized. According to an investigation by the Los Angeles Times, 57% of the cases decided by the Board in October 2002 were affirmed without opinion. In total, individual Board members summarily affirmed 16,275 cases between March 1, 2002 and September 24, 2002. This increase in AWO decisions corresponds with an increase in denials; in October 2002, for example, the Board rejected 86% of its appeals, compared with 59% the previous October. See L. Getter and J. Peterson, Speedier Rate of Deportation Rulings Assailed, Los Angeles Times, January 5, 2003, at A-1.

In addition, the American Immigration Law Foundation has taken an informal study which indicates:

> that half of the decisions issued by the Board were AWO decision; this means that there may have been over 100 AWO decisions on any given day...under the new regulations, an even larger number of AWO decisions is likely, because the AWO process - which was discretionary - is now mandatory for all cases that satisfy the cirteria..Because Board Members are churning out such a high volume of these decisions, it is difficult to believe that they are carefully reviewing every appeal to ensure that it meets all of the requirements for

an AWO decision[4]. See Kenney, Mary, How To Challenge An Affirmance Without Opinion By A BIA Member, <http://www.ailf.org/lac/lac_pa_100102.asp>, September 27, 2002 at 2.

These statistics clearly illustrate the sheer number of AWO cases and further reveal the likely possibility of gross and flagrant error put forth by the circuit courts as discussed above further stressing the importance of review in the instant case.

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[4] For example, in Farjardo v.INS, 2002 U.S. Lexis 16045 (9th Cir. Aug. 9, 2002), the court reversed and remanded an AWO decision after finding that the underlying decision by the IJ was based upon two "clear"-and prejudicial - errors of law. AWO should never have been used in that case, since one of the requirements is that any errors by the IJ be harmless ones. Similarly, in the precedent case Matter of Ramos, 23 I. & N. Dec. 336 (BIA 2002), a single Board Member originally - and erroneously - used the AWO procedure to affirm the IJ's determination that a felony DWI under Massachusetts's law was an aggravated felony. On reconsideration, the Board, en banc, used this case to overrule its earlier precedent on DWI convictions. A precedent-setting case by definition cannot satisfy the criteria for AWO and the single Member clearly erred in using this procedure initially. Unfortunately, most erroneous AWO decisions will not be overturned on reconsideration.

iii. EVEN THE GOVERNMENT, WHO ADVOCATED USED OF THE AWO PROCEDURE IN THE INSTANT CASE, HAS BEEN FORCED TO REALIZE THE PROCEDURE'S INVALID NATURE.

The government has moved to remand some federal court appeals for new Board decisions specifically because the Board erred in using the AWO procedure in the case. See, e.g., Paz v. Bulger, No. 02-22024 (S.D. Fla. Dec. 5, 2002) (because the Board had erroneously used the AWO procedure, government requested remand so that a three-member panel of the Board could decide the appeal); Tapia-Rodriguez v. Ashcroft, No. 02-60660, motion to dismiss filed, (5th Cir. Feb. 5, 2003) (government moved to dismiss court appeal after Board sua sponte reopened case – upon government's request – because it had erred in using the AWO procedure); Sylla v. INS, No. 02-2915/03-1348 (3d Cir. Feb. 10, 2002) (government moved to remand case to the Board after petitioner and AILF challenged the AWO procedure).

Therefore, the Government has repeatedly questioned the validity of the very same procedure it advocates for in the instant case. At minimum, such conflict demonstrates the critical nature importance of this issue thus deserving of this Court's review.

iv. INVALIDATION OF THE AWO PROCEDURE AND REQUIREMENT OF THE BIA TO PUT FORTH A REASONED OPINION WOULD ALLEVIATE THE HEAVY CASE LOAD IN THE JUDICIAL CIRCUITS.

It is common knowledge for any practitioner in the federal court system that the federal courts are severely overworked based on an apparent inundation of petitioner for direct review filed by immigrants. (App. "D", *infra*, 29a-31a.) In that this inundation of new cases in the federal judiciary coincides with the AWO procedures' implementation is no coincidence. (App. "D", *infra*, 29a-31a.) Forcing the BIA to put forth reasoned opinions would clearly lessen the already-heavy burden on the federal courts and increase judicial economy. Moreover, this sheer number of new filings demonstrates the burden the AWO procedures are placing on the federal courts in abdication of the BIA's statutory duties and in deprivation of an alien's Fifth Amendment right to due process.

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

DATED: December 13, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-72303

[Filed July 31, 2006]

ESTELA ORTIZ-NAVA,	)
Petitioner,	)
	)
v.	)
	)
ALBERTO R. GONZALES,	)
Attorney General,	)
Respondent.	)
	)

On Petition for Review
of an Order of the Board of Immigration Appeals
Agency No. A96-188-614

MEMORANDUM*

Submitted July 24, 2006**

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

Estela Ortiz-Nava, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' order affirming without opinion an immigration judge's ("IJ") decision denying her application for cancellation of removal. To the extent we have jurisdiction, it is conferred by 8 U.S.C. § 1252. We dismiss in part and deny in part the petition for review.

We lack jurisdiction to review the IJ's discretionary determination that Ortiz-Nava failed to show exceptional and extremely unusual hardship. *See Martinez-Rosas v. Gonzales,* 424 F.3d 926, 930 (9th Cir. 2005). To the extent Ortiz-Nava contends that the IJ misapplied the law to the facts of her case, this contention does not state a colorable due process claim. *See id; see also Sanchez-Cruz v. INS,* 255 F.3d 775, 779 (9th Cir. 2001)(holding that the "misapplication of case law" may not be reviewed).

Ortiz-Nava's due process challenge to streamlining is foreclosed by *Carriche v. Ashcroft,* 350 F.3d 845, 851 (9th Cir. 2003).

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

PETITION FOR REVIEW DISMISSED in part; DENIED in part.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A96-188-614- San Diego

[Filed March 25, 2005]

IN REMOVAL PROCEEDINGS	)
	)
In re: ORTIZ-NAVA, ESTELA	)
	)

Decision of the Board of Immigration Appeals

ORDER

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (the

"DHS," formerly the Immigration and Naturalization Service). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the DHS, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/_____
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
SAN DIEGO, CALIFORNIA

File No.: A 96 188 614

[Filed February 11, 2004]

IN REMOVAL PROCEEDINGS	)
	)
In the Matter of	)
ESTELA ORTIZ-NAVA	)
Respondent	)
	)

CHARGE: Section 212(a)(6)(A)(i) of the I&N Act (present in the United States without being admitted or paroled after inspection).

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent, a 38-year-old native and citizen of the country of Mexico, crossed illegally into the United States without first being admitted or paroled after inspection, either in November 1987 or sometime after, in 1989. She has remained in the United States without detection until she voluntarily turned herself in to the Immigration authorities, according to her testimony. After turning herself over to the

authorities, the Department of Homeland Security initiated these proceedings when it served upon her a Notice to Appear (Form I-862) (Exhibit 1).

The charging document was filed with the Court in San Diego, California on April 2, 2003, vesting this Court with jurisdiction over the respondent's case.

The procedural history of the case is familiar to both parties. Therefore, the whole history will not be repeated herein. At the hearing conducted on July 22, 2003, the respondent was present in court and appeared with co-counsel. The respondent does admit to the truth of all factual allegations and concedes her removability under the single charge brought against her. Based upon the respondent's admissions and concession, through counsel, the Court does find the respondent to be removable, as charged. The respondent has named Mexico as the country of choice, indicating that she has no fear of returning to her native land. Therefore, the Court has honored her request and named Mexico. She is clearly not interested in preconclusion voluntary departure under Section 240B(a) of the Act; rather, she seeks cancellation of removal under Section 240A(b)(1) of the Act and post conclusion voluntary departure, in the alternative, under Section 240B(b)(1) of the Act. The case was set over for a hearing on the merits, and the respondent was given an opportunity to file her application. The Government was also given an opportunity to respond. The respondent did file with the Court her fully documented application for cancellation of removal, with accompanying documents, on October 20, 2003 (Group Exhibit 11). On today's date, she filed further evidence to show that she is currently employed and that her sister and brother-in-law have agreed, in principle, to caring for the respondent's three citizen children. On today's date, the respondent was present

in court, prepared to go forward with her case. She offered her sworn testimony and the sworn testimony of her three citizen children in an effort to meet her burden of proof. The Court had the privilege of hearing the live testimony of her 15-year-old United States citizen son. The other two younger children's testimony was accepted by way of stipulation from both parties. The respondent argues that she has established her eligibility for cancellation of removal for certain nonpermanent residents, as a matter of law and discretion. In the alternative, she contends that she establishes her eligibility for post conclusion voluntary departure. The Government counters that the respondent has met three of the four statutory components for cancellation, but has been unable to show that her removal would result in exceptional and extremely unusual hardship to any of her three children or to all three of the children, cumulatively. In the alternative, the Government contends that she should be denied post conclusion voluntary departure, as a matter of discretion. The Court will analyze, first, her application for cancellation of removal for certain nonpermanent residents and then turn its attention to post conclusion voluntary departure.

Under Section 240A(b)(1) of the Act, the Attorney General may cancel the removal of and adjust status to that of an individual lawfully admitted for permanent residence if the respondent establishes that she has been physically present in the united States for a continuous period of not less than 10 years immediately preceding the date of her application; that she has been a person of good moral character during such period; that she has not been convicted of any disqualifying offense; and that she establishes that her removal would result in exceptional and extremely unusual hardship to her spouse, parent, child, or children who is or are citizens of the United States or lawfully admitted for permanent residence. Section 240A(b)(1)(A)-(D) of the Act. It is up to the respondent to

establish that she merits this relief, both as a matter of law and discretion, keeping in mind that the burden of proof is squarely upon her. *See Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002); *Matter of Andazola*, 23 I&N Dec. 319 (BIA 2002); *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001).

In this case, the respondent has established that she has been physically present in the United States for the continuous period of 10 years immediately preceding the so-called "stop time" event. In this case, the stop time event would be service of the Notice to Appear upon her. When the Notice to Appear was served upon her on March 27, 2003, she had been residing continuously in the United States since sometime in 1989. The Court does give weight to the respondent's testimony and to the documentary evidence that she has provided. She explained that she first came to the United States with a nonimmigrant border crossing visa in 1987. She explained that she was primarily residing in Colonia Miramesa (phonetic sp.), in the city of Tijuana, in the country of Mexico. She explained that she would cross over to the United States on weekends. It was during an occasion in 1988 that she gave birth to her oldest son. After he was born in the United States, she returned with him to Tijuana, Mexico. She did not take up residence in the United States until 1989. Since that time, she has not departed the United States and has resided continuously in this country. Her testimony is supported by various documents which establish the continuous nature of her residence in the United States.

In addition, the respondent has established that she is a person of good moral character throughout such a period. In fact, the respondent has established that she is a person of high moral character, who is truly motivated by a desire to bring out the very best in her three citizen children. The Court would point to the many letters that the respondent has

offered as a testament to the type of character that she has. Furthermore, the evidence before this Court shows that the respondent, as of September 6, 2002, had totaled more than 247 volunteer hours at the Rosa Parks Elementary School (Group Exhibit 11, at P.19). As a testament to her moral character, the author of the letter points out that the respondent has been a "great parent volunteer and role model for other parents." On this record, the respondent has established that not only is she a person of good moral character, but she is also a person of high moral character.

In addition, the respondent has apparently suffered no criminal convictions, either in this country or in her native country of Mexico. She has established, on this record, that she has not been convicted of any of the type of offenses that would disqualify her from this remedy under Section 240A(b)(1)(C) of the Act.

Indeed, as the parties have focused in their eloquent summations, the key before this Court is whether the respondent has established that her removal from the United States would result in exceptional and extremely unusual hardship to either her 15-year-old son, Jose Arturo-Nava; her soon to be 14-year-old citizen son, Christopher Ortiz; or to her 9-year-old son, Angel Ortiz, either separately or cumulatively.

Before the Court embarks upon its analysis, it is important to keep in mind that the burden of proof upon the respondent is not to demonstrate that her removal would result in a unconscionable level of hardship to any or all of her three citizen children. *See Matter of Monreal, supra*. The respondent must demonstrate that her qualifying family member or members would suffer hardship that is

substantially beyond that which would ordinarily be expected to result from that person's parent.

The Board followed its decision in *Matter of Monreal* with the decision in *Matter of Andazola*, *supra*, in which it emphasized that each case must really be analyzed upon its own merits, but concluded that in that case, the respondent had not carried the burden of proof.

It followed its decision in *Matter of Andazola* with a published decision in *Matter of Recinas*, *supra*, in which it again emphasized that each case must be examined on its own merits. In *Matter of Recinas*, the Board concluded that there, the single mother with no family ties in Mexico, and the parent of six children, four of whom were United States citizens, had carried her burden of proof to establish the requisite level of hardship.

This Court emphasizes that it has been a well-settled principle of Immigration law that an individual does not gain a favored status by the birth of citizen children. It is perhaps even more important to point out, though, that hardship to a United States citizen child is something to which this Court must give careful consideration, particularly in the context of cancellation of removal for certain nonpermanent residents. *See Casem v. INS*, 8 F.3d 700 (9th Cir. 1993) (The Court of Appeals emphasized that in the suspension of deportation context, hardship to a citizen child is an important factor to which this Court must give special and careful consideration. That principle is even more important in cancellation of removal because the Court can no longer weigh the hardship to the respondent, herself).

The Government correctly points out that there are two possible scenarios for this Court to consider in evaluating the

type of hardship that would befall the three citizen children. The United States Court of Appeals for the Ninth Circuit, the jurisdiction in which this case arises, did, in *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), overrule a portion of the Board of Immigration Appeals decision in *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994).

Specifically, the Court of Appeals concluded that it would be improper to attribute hardship to a parental choice, but acknowledged and affirmed the principle espoused by the Board of Immigration Appeals that if a parent or parents were going to leave a child behind, they must come forth with the evidence to show that that is a realistic opportunity. In this Court's view, the Ninth Circuit disapproved of attributing hardship to parental choice where that would be an actual consequence of deportation, but did clearly agree with the evidentiary standard showing that the respondent would have to come forth with the evidence to show that that is a realistic opportunity.

In order to understand the potential hardship to the three citizen children, the Court must examine the respondent's situation, herself. She is an individual who is in apparent good health. She came to the United States in 1987 for the first time to visit when she was approximately 22 years of age. She did not take up residence until she was approximately 24 years of age. The respondent has been a hardworking person, dedicating herself to taking care of her three children at home. She has found employment outside of the home beginning in 2000, and she has worked steadily since that time. She has been a tremendous volunteer at her children's school, recognizing the value of an education and the importance of that for young people in an effort to get ahead. She does have substantial ties to her native country of Mexico. She has explained that both of her parents reside just

across the border, in the city of Tijuana. She also has five siblings who are in her native country of Mexico, in the city of Tijuana.

The respondent's desire to instill important educational goals in her children was clearly reflected by the testimony of her son, Jose Nava. This bright young man is excelling as a sophomore at Herbert Hoover High School. He continues to achieve nothing but the highest. The record is replete with certificates that he has received as a result of his outstanding educational achievements. He has received a 4.0 for four repeated occasions. He is first chair for the baritone in the band. He has obtained one of the highest belts that he can obtain in karate. He has future plans and goals as an architect. He is in very good health. He is recognized as a gifted and talented student by the educators by designated a "GATE" student. It is also very clear to this Court that his educational drive and desire to achieve success is received to him from the emphasis that his mother has placed on his education.

Also, the educational drive is reflected by the testimony of Christopher and even Angel. They are younger than Jose, but they appear to be right where he was when he was their age. Christopher has testified that he, too, is in band and is afraid that if he goes to Mexico he might not be in the band. Angel has given this Court testimony indicating that he likes tennis, and he is afraid that if he is taken to Mexico, he would have nowhere to live.

The court concludes that the respondent has not carried her burden of proof to show that her removal from the United States would result in exceptional and extremely unusual hardship to any of the three children, either separately or cumulatively. If the respondent were to leave the children behind, she has not carried the evidentiary consideration to

show that it is a viable option to leave them with her sister and her brother-in-law. The letter that the respondent has offered to this Court today from them does lack details. Further details are required based upon the further testimony. For example, Jose has indicated that he has never been to Arizona. There is no testimony that the respondent, herself, who is clearly concerned with the education of her children, has investigated to what schools they might attend in Arizona. Furthermore, the Court does not have evidence as to whether it would be economically viable for the respondent's three citizen children to go with her sister and brother-in-law. The respondent's testimony regarding whether they had the economic means was rather vague as to whether they could care for their three children plus the respondent's three children and continue to advance the educational goals that the respondent has set for her three children and that they appear to have for themselves.

In addition, there is no clear testimony that that is something that would be permitted by the respondent's spouse, the father of two children and the stepfather of Jose. The record before this Court suggests that he had a deportation hearing, himself. He was apparently granted voluntary departure. He apparently appealed that decision to the higher authority. According to the respondent's testimony, he was ultimately apprehended at their home and deported from the United States. She explained that she received a call from him, indicating that he was in the custody of the Immigration officials. He was returned and deported to Tijuana. He turned around and crossed back, illegally, the following day.

There is no evidence from this Court that he would allow the three children to actually live with another family. Furthermore, the record suggests that the respondent's sister,

while she might be considered to be "in process", the evidence before this Court does not show that she is entitled to any lawful status in the United States while she continues to await that process.

It is probable or possible that the respondent leaves the three citizen children with their father, here in the United States, now that he has crossed back illegally into this country. If that is the case, then the Court concludes that the respondent has not established that her removal would result in a level of hardship substantially beyond that which would ordinarily be expected. The three children could continue with their education, here in the United States, at the very same school. The respondent herself would be just across the border, most likely in the city of Tijuana. It might be difficult for her to maintain the type of supervision that she does so now, but there would be nothing which would prevent the children from excelling in the very same fashion in which they do here in the United States. All three of the children are in apparent good health. They have their home needs met for in the United States because their parents own their present abode here in this country. Even though their father has crossed back illegally into the United States, he has been able to continue with his gainful employment in the United States and provides for their economic needs.

The court must also examine whether the respondent would take the three citizen children with her to Mexico. This is certainly a more difficult proposition because the three children would be uprooted from their current educational situation. The three have explained that English is clearly their best language. The three of them do understand Spanish, but none of them is versed in the written Spanish language. There is nothing, though, before this Court to show that they would be denied educational opportunities in Mexico if the

respondent were to elect to take them with her. In fact, the fact that the children are doing so well in this school would suggest that they would be quite adaptable to any educational system in Mexico. The three of them are dedicated to doing the best that they can in school, and that would seem to be the type of skill that would translate to any new school to which they might attend. Certainly, it would be difficult for Jose to catch up to his peers if he were to go to school in Mexico, but the very same talents which led him to excel in this country are the same type of skills that would benefit him if his mother would elect to take him to Mexico. Furthermore, the same can be said for Christopher and Angel, as they, too, are doing extremely well in school.

The record before this Court shows that the children would also benefit by the significant amount of equity that their parents have in their home. The Court cannot overlook the fact that they presently have more than $180,000 of equity in their current abode here in the United States. The Court has absolutely no evidence which would show country conditions in Mexico, but must, to a certain degree, rely on its experience. While certainly, the economic situation, as a general matter, country-wide in Mexico is less than what is country-wide here, certainly the significant equity that they have in their home would be something that could benefit them in Mexico. In that regard, the respondent's case is closer to the respondent's situation in *Matter of Andazola*, *supra*, than it is in *Matter of Recinas*, although, as the respondent's able attorney points out, the children in *Andazola* are clearly younger than Jose and Christopher. To the extent that the respondent compares her situation to that of *Matter of Recinas*, there, the respondent was a single parent without any family ties to Mexico, whereas here, the respondent is clearly a married person with substantial family ties in her native

country of Mexico. In fact, those ties are just across the border, in the city of Tijuana.

When the Court weighs all of these factors together and emphasizes, also, that it was very impressed with the testimony of Jose, in particular, the respondent has not carried her burden of proof to show that her removal from the United States would result in a substantial level of hardship beyond that which would ordinarily be expected to result to her citizen children, either separately or cumulatively, under the facts and circumstances of her case. Her application for cancellation of removal for certain nonpermanent residents must be denied for her failure to carry her burden of proof under Section 240A(b)(1)(D) of the Act.

In the alternative, the Court examines whether she has carried her burden of proof for the limited relief of post conclusion voluntary departure under Section 240B(b)(1) of the Act. The Government argues that it must be denied, as a matter of discretion, pointing to two reasons. The first reason to which the Government points is really a statutory issue as to whether the respondent has established, by clear and convincing evidence, that she would be ready, willing, and able to obey such an order if given this opportunity. On that point, the Court does acknowledge that it is a close call, because when she was asked twice on direct, she first said no, that she would not depart. On the third occasion, the Government objected, but the Court did overrule the objection and allow the question to be posed to the respondent. It overruled the Government's objection because there can be no doubt of the respondent's desire to remain in this country. After all, her children are doing very well. They have been permitted to flourish because of her care, the economic support of her husband, and the benefits that the children receive as a result of being United States citizens within the

state of California. After being permitted to answer that question the third time, the respondent did seem to be clear that she would obey the order and would depart the United States. The Court finds that, then, she is statutorily eligible for post conclusion voluntary departure because she meets all four components.

The next issue is whether she deserves this relief, as a favorable exercise of discretion. The Government points out that her husband apparently ignored his voluntary departure and had to be forcibly deported from the United States. After his deportation, he turned around, the following day, and crossed back to this country illegally. Her husband seems to have a clear and complete disregard for the Immigration laws of this country. He seems to ignore the fact that there are thousands of people from Mexico, who are in Mexico today, who would be happy to cross into this country illegally, but they are respecting the laws of the United States, waiting for their turn. When her husband crosses back here illegally, he, in some ways, pays this country a compliment, but at the same time, he snubs his fellow countrymen who are in Mexico actually waiting their turn to cross legally to the United States and who might, if they knew that they could get away with it, cross into the United States illegally.

The court finds that it would be in impermissible exercise of discretion to penalize the respondent for the flagrant disregard that her husband appears to have to the Immigration laws of this country. The Court does not hold that against her in any way. Instead, it points out that the respondent, herself, should be very proud that she is raising three United States citizen children in a way that shows that they are going to succeed, either here in the United States or, if for some reason, the respondent has to bring them to Mexico. The respondent, herself, has every single incentive to obey any

grant of voluntary departure. If the Court tries to look into the crystal ball of the future, her oldest son will soon, perhaps within the blink of a parental eye, be 21 years of age. When he becomes 21, this Court has no doubt that he is likely to petition for his mother right away because then he will have the power to have a say under the law that she remains in the United States. If she has disobeyed the order of voluntary departure and cross back illegally, there is no way under the law as it is written today that she will be able to immigrate, legally, to this country. *See* Section 212(a)(9)(C) of the Act. The respondent, herself, might have internal conflict as to whether she should obey the Immigration laws of this country, particularly when the other laws of our society benefit her and her family so much so. When the Court weighs all of those factors together and observes, as her attorney has vigorously pointed out, she has been an otherwise law abiding member of her community, and she is truly motivated by the very best for her children, she does deserve this minimal relief, as a favorable exercise of discretion. The Court will therefore grant her the maximum period of time allowable under the law and impose upon her the minimum bond, keeping in mind that she has three powerful equities, as a matter of discretion, those being her wonderful citizen children, to add with the other equities that she has presented. Accordingly, the Court will enter the following orders in the case.

ORDERS

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal for certain nonpermanent residents under Section 240A(b)(1) of the Act be, and is hereby, denied.

IT IS FURTHER ORDERED that the respondent be granted the privilege of voluntarily departing the United States on or before April 12, 2004, or any extension that she has received in advance from the District Director for the Department of Homeland Security, and under any other conditions as imposed upon her by the Department of Homeland Security. The grant of voluntary departure is conditioned upon the respondent posting a voluntary departure bond in the amount of $500 within five business days of the Court's decision. If the respondent should fail to post the required bond, or if she should fail to depart the United States before the expiration of the authorized period of time, the following order would be entered against the respondent without any further notice or hearing to her: The respondent is ordered removed from the United States to Mexico under the charge brought against her in the Notice to Appear.

THE RESPONDENT IS FURTHER ADVISED: that in accordance with Section 240B(d) of the Act, that if she should fail to voluntarily depart the United States within the time period specified, she shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and she should be ineligible for a period of 10 years for any further relief in the form of voluntary departure, cancellation of removal under Section 240A, adjustment of status under Section 245, any change in any nonimmigrant status under Section 248, and any registry under Section 249 of the Act.

/s/ _____
RICO J. BARTOLOMEI
U. S Immigration Judge

By:/s/ _____
ROBERT J. BARRETT
Immigration Judge

APPENDIX D

Testimony at Hearing on "Strengthening Interior Enforcement: Deportation and Related Issues" (4/14/2005)

Before the Subcommittee on Immigration, Border Security and Citizenship and the Subcommittee on Terrorism, Technology and Homeland Security of the Senate Committee on the Judiciary

Submitted by

Lee Gelernt
Senior Staff Counsel, ACLU Immigrants' Rights Project
and
Lucas Guttentag
Director, ACLU Immigrants' Rights Project

Chairman Cornyn and Kyl, Ranking Members Kennedy and Feinstein and Members of the Subcommittees of the Senate Judiciary Committee:

On behalf of the American Civil Liberties Union and more than 400,000 members dedicated to defending the Constitution and its promise of fair process for all persons, including immigrants, I welcome this opportunity to present the ACLU's views at this important hearing.

The hearing covers a number of critical issues. We will not attempt to address all of them in our testimony today. Instead, our testimony will focus on the role of the courts in

immigration cases, and in particular, on the issues raised by the Supreme Court's decision in St. Cyr, which rejected the Justice Department's sweeping claim that the Writ of Habeas Corpus had been repealed in 1996 and was therefore no longer available to immigrants challenging their deportation.[1]

Our testimony makes two points. First, we hope to convey a sense of the complexity and far-reaching importance of the issues raised by the St. Cyr decision. Indeed, as we explain, the issues in St. Cyr transcend the immigration field and go to the very heart of who we are as a country, a country which can now count more than two centuries of unwavering commitment to the rule of law and to the Great Writ of Habeas Corpus.

In light of the complexity and historic importance of the issues, any legislation by the Congress in this area will necessarily raise profound constitutional questions, as well as difficult issues of immigration policy and court administration. We thus respectfully urge Congress to give any new proposals in this area the most careful and deliberate consideration and to dismiss out of hand any proposals that would eliminate habeas corpus for immigrants facing detention or deportation. No Congress in the history of this country has ever eliminated habeas corpus for immigrants facing deportation, and this Congress should likewise reject any proposal that would take that extraordinary step.

Secondly, we will explain why the attacks that have been leveled against the St. Cyr decision are misplaced. Insofar as there are concerns about the increased number of immigration cases in the courts, those concerns are, in our view, more

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[1] INS v. St. Cyr, 533 U.S. 289 (2001).

appropriately directed at the Attorney General's 2002 decision to eliminate any meaningful oversight role by the Board of Immigration Appeals (BIA), a decision which has shifted much of the burden to the courts and left the Judiciary with the task of providing the only real check on erroneous decisions made by immigration judges.

I. St. Cyr and The Historic Role of Habeas Corpus in Deportation Cases.

At one level, the St. Cyr decision was about immigrants and immigration law. But that narrow characterization would not fully capture what was at stake in St. Cyr. Fundamentally, St. Cyr was about the history of judicial review in the United States and the indispensable role played by the federal courts in safeguarding the rights of all persons, including the most vulnerable and politically powerless among us. In particular, St. Cyr explained the history of the Great Writ of Habeas Corpus, which has, from its English origins to modern times, guaranteed the right to go to court to test the legality of the government's actions for any individual threatened with a deprivation of his or her liberty.

The Great Writ has been described as "the most important human right in the Constitution."[2] Indeed the Framers of the Constitution included few protections in the original document that specifically protected individual rights, but they did include the right to habeas corpus.[3]

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[2] Zechariah Chafee, Jr., The Most Important Human Right in the Constitution, 32 B.U. L. Rev. 143 (1952).

[3] See U.S. CONST., Art. I, § 9, cl. 2 (the "Suspension Clause").

The St. Cyr case itself involved a longtime, lawful permanent resident who was ordered removed on the basis of a criminal conviction. It was undisputed that prior to the passage of the 1996 amendments to the Immigration Act, an immigration judge could have granted Mr. St. Cyr a waiver of deportation based on his significant ties to this country. At the urging of the Justice Department, however, the BIA took the position that the 1996 amendments should be construed to have retroactively eliminated the possibility of a waiver for Mr. St. Cyr, making his removal mandatory.

According to the BIA, deportation was now mandatory in hundreds of cases like Mr. St. Cyr's - regardless of how long ago the conviction occurred or any of the immigrant's other equities. Even relatively minor crimes would trigger mandatory deportation. As a result, an immigrant with a decades-old, non-violent conviction would be subject to automatic deportation - even if, for example, the immigrant had a U.S. Citizen spouse and child, had come to this country at a very young age, and had never again had any involvement with the law.

Even more fundamentally, the Justice Department took the remarkable position that no court could review whether the BIA had properly construed the 1996 amendments to apply retroactively. In the Justice Department's view, Congress had stripped the federal courts of their power - including by Habeas Corpus - to review whether the BIA's legal rulings were consistent with the governing statutes enacted by Congress.

Thus, even if the BIA had incorrectly concluded that Congress never intended to retroactively institute a mandatory deportation scheme, no court had the power to enforce the law and stop Mr. St. Cyr's deportation or any of the hundreds

of other illegal mandatory deportations. The only review that would be available was by administrative judges - immigration judges and the BIA. Yet a process confined to the Executive Branch has never satisfied the fundamental tenets of judicial review and plainly cannot displace the guarantee of habeas corpus.

The issues before the Supreme Court in St. Cyr were thus grave, with far-reaching practical and symbolic importance. Had the Justice Department's jurisdictional position prevailed, it would have been the first time in which an immigrant could be deported without any court reviewing the legal validity of the deportation order, even by habeas corpus.

The Supreme Court ultimately held in June 2001 that (1) the courts retained their historic habeas jurisdiction to review deportation orders, and (2) the Justice Department and BIA were wrong in interpreting the 1996 amendments to apply retroactively.

There are at least three overarching points about the Supreme Court's decision that are worth emphasizing.

First, the Court left no doubt that review of deportation orders is constitutionally required, and in particular, that the Suspension Clause of the Constitution guarantees the right to habeas corpus review. Thus, the Court put to rest any notion that immigrants in general, or immigrants with criminal convictions in particular, had no right to habeas corpus.[4]

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[4] See, e.g., St. Cyr, 533 U.S. at 300 (noting that review in deportation cases "is unquestionably required by the Constitution" because of the Suspension Clause) (internal quotes and citations omitted). The Court concluded that Congress had not repealed habeas corpus and that there was therefore no need for it to address

Second, the Court emphasized that the right to habeas corpus was grounded in hundreds of years of unbroken practice and tradition in the United States and England, and that this practice and tradition applied equally to citizens and non-citizens. In particular, the Court traced the history of immigration law in this country and showed that there has never been a time when an immigrant could be deported based solely on the say-so of an administrative official. As the Court made clear, habeas corpus has always been available for immigrants as the ultimate safeguard against an unlawful deprivation of liberty.[5]

Indeed, the Court stressed that the use of habeas corpus to test the legality of a deportation order fell within the original "core" purpose of the Writ because it involved a challenge to Executive detention. In contrast, the Court noted that the use of habeas corpus in post-conviction criminal cases involves detention ordered by a court after a full trial, where habeas would not be the only review a defendant received.[6]

Finally, St. Cyr illustrates a more general point about judicial review and the role played by courts in the immigration system, namely that oversight is critical to the proper functioning of a fair system. Judicial review may seem at times like a technical, abstract concept. But, in practice, the

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the grave and far-reaching constitutional problems that would have been triggered by the elimination of all review, including habeas review. Id. at 304-05.

[5] St. Cyr, 533 U.S. at 305-07 (noting that if habeas is no longer available it "would represent a departure from historical practice in immigration law").

[6] St. Cyr, 533 U.S. at 300-02.

courts play an indispensable role in enforcing the rule of law and preventing grave instances of injustice that would otherwise profoundly and inalterably change the lives of countless immigrant families.

Indeed, but for the Court's decision to review Mr. St. Cyr's case, he and hundreds of other longtime residents would have been deported pursuant to unlawful deportation orders, banishing them and their families from the United States, where they may have lived since they were small children. At the end of the day, it is critical that the lives of these individuals not be lost in a blur of aggregate statistics and policy arguments.

Jerry Arias-Agramonte is one of the people who would have been erroneously deported in the absence of habeas. He came to this country as a teenager in 1967, as a lawful permanent resident. He has United States citizen parents and siblings, and six United States citizen children, one of whom served in the military. In 1977, Mr. Arias-Agramonte pled guilty to a New York State controlled substance offense in the fifth degree, for which he received a sentence of probation. On the basis of this nearly 20-year old conviction he was placed into removal proceedings and subject to mandatory deportation under the BIA's retroactivity ruling. The district court reversed the retroactivity ruling and granted him the right to seek a waiver of deportation before an immigration judge based on his family ties, long residence and gainful employment. An Immigration Judge subsequently granted the waiver. In the absence of habeas, Mr. Arias-Agramonte

would have been mandatorily and unlawfully deported from a country in which he had lived since 1967.[7]

Ironically, it is often immigrants who most appreciate the true meaning of judicial review. For many immigrants, it is the very right to go before a neutral judge that, in their minds, differentiates the United States from other countries that lack the same commitment to the rule of law. They feel viscerally what Justice Frankfurter observed long ago--that "[t]he history of American freedom is, in no small measure, the history of procedure."[8] And no procedure has been more integral to preserving freedom in this country over the past two hundred years than the Great Writ of Habeas Corpus.

In short, St. Cyr makes clear that immigrants may not be deported without access to the courts, based solely on the word of an administrative judge. At a minimum, habeas corpus must be available to test the legal validity of the deportation order - a right that no Congress has ever taken away.

II. The Attacks on St. Cyr and Habeas Corpus Are Misplaced.

Some have suggested that the current judicial review scheme must be revised. Two particular objections are commonly heard.

First, some have suggested that the federal courts are being overloaded with immigration cases and that St. Cyr and

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[7] Arias-Agramonte v. INS, 2000 WL 1059678 (S.D.N.Y. 2000).

[8] Malinski v. New York, 324 U.S. 401, 414 (1945).

habeas review are to blame. But habeas cases challenging removal orders are not the problem.

The real increase in immigration cases is due to the greatly increased number of "petitions for review" filed directly in the courts of appeals.[9] And, critically, that increase has coincided with the BIA "streamlining" reforms put into place by the Attorney General in 2002 - reforms that have resulted in a manifold increase in the number of orders issued by the BIA by effectively gutting the administrative review process and thereby shifting the burden to the circuit courts to undertake the only meaningful appellate review of immigration judge decisions.[10]

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[9] Prior to the implementation of the streamlining regulations, federal appeals courts were receiving approximately 1,500 BIA appeals per year. U.S. Department of Justice, Fact Sheet, "BIA Restructuring and Streamlining Procedures," (Dec. 8, 2004). See also Association of the Bar of the City of New York, "The Surge of Immigration Appeals and its Impact on the Second Circuit Court of Appeals," at 4 (noting that there were more than 8,500 BIA appeals filed in the circuit courts in 2003, up from approximately 1,600 in 2001, before the BIA reforms went into place).

[10] A number of detailed reports on the BIA reforms have documented that the increase in appeals to the circuits has coincided with the BIA reforms, a point even the government has acknowledged. See, supra, U.S. Department of Justice, Fact Sheet; Association of the Bar of the City of New York, "The Surge of Immigration Appeals and its Impact on the Second Circuit Court of Appeals"; see also Dorsey & Whitney LLP, Study Conducted for The American Bar Association, "Board of Immigration Appeals: Procedural Reforms to Improve Case Management," July 22, 2003.

Among other things, the Attorney General's reforms (1) cut by almost one-half the total number of Board members; (2) expanded the number of cases that will now be reviewed by a single Board member, rather than a three-judge panel; and (3) expanded the number of cases that will be decided on the basis of one-line "AWO" orders, which state only that the immigration judge's decision has been Affirmed Without Opinion. As a result, there is no longer meaningful administrative appellate review, with reasoned decisions from appellate panels. Rather, the BIA now simply churns out unexplained, one-line decisions at an unprecedented rate, with the circuit courts getting thousands of new cases each year.[11]

Thus, insofar as the aggregate number of immigration cases is perceived as a problem, the solution is not to attack the St. Cyr decision. Congress should mandate, among other things, that the Attorney General re-institute a meaningful

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[11] The reforms have resulted in the BIA deciding thousands more cases each year, meaning that there are that many more cases each year that can be appealed to the circuits. See, e.g., U.S. Department of Justice, Executive Office for Immigration Review, FY 2004 Statistical Yearbook at S2 (showing that in 2001 the BIA decided approximately 27,000 cases on appeal from Immigration Judges, but more than 46,000 cases in 2003, after the 2002 BIA reforms went into place). Moreover, not only did the aggregate number of BIA decisions increase dramatically in light of the 2002 reforms, but the rate at which immigrants appeal BIA decisions to the circuit courts has increased, see, e.g., DOJ Fact Sheet, supra, suggesting that the increased number of appeals to the circuits is likely also due to dissatisfaction by immigrants with the lack of a reasoned, considered decision by the BIA. See also Dorsey & Whitney ABA Report, supra n. 9, at 39 ("because the BIA backlog reduction is achieved by depriving aliens of meaningful agency review, aliens are seeking meaningful review in the federal circuit courts"); see also id. at 40.

administrative appellate process before the BIA. Doing so will prevent the BIA from simply shifting the responsibility to the courts to provide the only meaningful review of immigration judge decisions.

The second commonly heard objection to St. Cyr is that immigrants with criminal convictions are now getting "two bites at the apple," while non-criminals receive only one bite. By this, detractors apparently mean that non-criminals must begin the review process in the court of appeals, but immigrants with criminal convictions get two bites because they start in the district court in habeas and can then appeal an adverse habeas decision to the circuit (the so-called extra bite at the apple, which, incidentally, the government gets as well).

But it is misleading to suggest that immigrants with criminal convictions get more review than non-criminals. In fact, they get less review. The reason is that the 1996 court-stripping provisions significantly restrict the types of claims that they can bring to the courts - in habeas or otherwise. Thus, the review they receive in federal court, from both the district and circuit courts, is not as searching as that received by non-criminals.[12]

In any event, Congress is free to return to the pre-1996 scheme and make the courts of appeals the primary forum for review for all immigrants, criminal and non-criminal. But if Congress chooses to return to the pre-1996 scheme and make the circuits the primary forum for review, it must also do both of the following:

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[12] St. Cyr, 533 U.S. at 314 n.38 (noting limitations on "scope" of habeas review for immigrants with criminal convictions).

(i) ensure that all immigrants, including those with criminal convictions, receive the constitutionally-required one bite at the apple in the circuit court, which cannot happen under the current system due to the 1996 court-stripping amendments. This means that the circuit courts must be able to meaningful review the legal validity of the deportation order for consistency with the Constitution and governing statutes and regulations. In other words, the circuit courts must be able to review constitutional claims and all questions of law, including the application of law to fact (so-called "mixed" questions of law).[13]

(ii) retain habeas corpus review as the ultimate safeguard for cases where the immigrant cannot obtain review in the circuit court and manifest injustice would occur in the absence of habeas review, such as in cases where an unscrupulous or negligent lawyer fails to file a petition for review in the circuit court within the required 30 days, or the immigrant does not receive proper notice of the BIA's decision. In other words, habeas corpus in the district courts need not be the primary avenue of review to challenge a deportation order, but it must remain as a backstop to prevent miscarriages of justice - as it has always done at every point in our Nation's history.

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[13] St. Cyr, 533 U.S. at 302 (noting that historically habeas covered all questions of law including the "erroneous application or interpretation of statutes") (emphasis added). There is no basis in the Constitution or in historical habeas practice for limiting review to "pure" questions of law. Moreover, any attempt to differentiate between types of legal questions (i.e., "pure" as opposed to "mixed" legal questions) will inevitably create years of unnecessary litigation over the elusive line separating the various categories.

Insofar as there are proposals to respond to St. Cyr that do not contain both of these features, they are deficient. Habeas review must be retained and all immigrants must receive one full bite at the apple (i.e., review of constitutional claims and all other legal claims, not just "pure" questions of law).[14]

In short, Congress has options. We stand ready to work with Congress on preserving full court review while accommodating the government's interest in channeling more immigration appeals directly to the circuit courts of appeals, if that is thought desirable. But one option that is not available is the repeal of habeas corpus and no option should be considered without careful and deliberate review in light of the enormous stakes.

Of course, the ACLU recognizes the authority of Congress to regulate immigration and entry into the United States. That is not the issue. Our point today is that the process for determining who is subject to removal must be fair and efficient to ensure that immigrants who have a right to remain are not deported erroneously and that the removal system is subject to judicial scrutiny.

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[14] There are many ways in which Congress can restore meaningful direct review in the courts of appeals for all immigrants, including by repealing the jurisdictional bar added to the Immigration Act in INA § 242 (a)(2)(c), 8 U.S.C. § 1252 (a)(2)(c). Insofar as there are proposals to amend INA § 242 (a)(2)(c) to restore review of only "constitutional" claims and "pure" questions of law, those proposals are deficient because they fail to restore review of mixed questions of law and fact (i.e., the application of law to fact); they are also deficient if they fail to protect habeas as a safety net. See, supra, n.12.

CONCLUSION

The history of immigration in the United States is a long and complicated one. What is striking is that at no time did any Congress ever take the extraordinary step of repealing habeas corpus for immigrants facing deportation. This unbroken tradition must be preserved. It is a tradition that powerfully demonstrates our Nation's historic and unwavering commitment to the rule of law.